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No. 83-1015

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, etc., *et al.*,

Appellants,

v.

HAMPTON COUNTY ELECTION COMMISSION, etc., *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

BRIEF FOR APPELLANTS

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70 pp

QUESTIONS PRESENTED*

(1) Did the District Court err in holding that, in preclearing an election law under section 5 of the Voting Rights Act, the Attorney General must be deemed to preclear as well all future changes in election practices and procedures which may occur in the implementation of that law?

(2) Did the District Court err in holding that changes in election practices and procedures need not be precleared under section 5 of the Voting Rights Act if those changes occur in the implementation of a separate election law which itself had earlier received such preclearance?

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* The parties to this appeal are set out at p. ii of the Jurisdictional Statement.

(3) Did the District Court err in holding that the implementation of a non-precleared change in election procedures cannot be enjoined under section 5 of the Voting Rights Act unless that change is in fact "alleged to have had either racially discriminatory purpose or effect?"

(4) Did the District Court err in holding that state action knowingly and illegally implementing a change in election law to which the Attorney General had objected under section 5 is never to be invalidated by the federal courts so long as that change subsequently receives preclearance?.

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No. 83-1015

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, etc., et al.,

Appellants,

v.

HAMPTON COUNTY ELECTION COMMISSION, etc., et al.,

Appellees.

On Appeal From the United States District Court For The District of South Carolina

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BRIEF FOR APPELLANTS

Opinion Below

The opinion of the district court of September 9, 1983, which is not reported, is set out at pp. 1a-11a of the appendix to the Jurisdictional Statement.

Jurisdiction

The order of the three-judge district court, denying injunctive relief and dismissing the complaint insofar as it sought relief under section 5 of the Voting Rights Act, was entered on September 9, 1983. (J.S. App. 1a). A timely notice of appeal was filed on October 10, 1983.[1] (J.S. App. 12a). See 28 U.S.C. § 2101(b). On December 7, 1983, the Chief Justice extended the date for docketing this appeal until December 16,

[1] The thirtieth day after September 9, 1983, was a Sunday, October 9, 1983. Accordingly, the notice of appeal was due on October 10, 1983, the date on which it was filed. Rule 6(a), Federal Rules of Civil Procedure; Supreme Court Rule 29.1.

1983. The appeal was docketed on December 16, 1983. Probable jurisdiction was noted on June 18, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1253.

Statutes Involved

Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c, is set out at pp. 1a-5a of the appendix hereto. Acts 547 and 549 of the South Carolina Laws of 1982 are set out at pp. 5a-8a and pp. 8a-13a of the appendix.

Statement of the Case

From prior to 1964 until 1982 the Hampton County public school system was controlled by the Hampton County Board of Education. During this period the six members of the County Board were appointed by the Hampton County members of the South Carolina legislature. The school system was in turn divided into two school districts with separate Boards of Trus-

tees, whose members were appointed by the County Board. Over 91% of all white public school students in the county attend the schools in District No. 1, while the student population of the District No. 2 schools is 92% black. Each school district has operated autonomously under the general supervision of the County Board and of an elected County Superintendent of Education.

On February 18, 1982, the South Carolina legislature enacted Act 547, which provided that, beginning January 1, 1983, the six members of the County Board were to be elected rather than appointed. (App. 10a-11a). The Superintendent of Education, while continuing to be elected at-large, was to serve as a seventh voting member of the newly constituted County Board. The first elections for the new County Board were to be conducted in November, 1982. The purpose for electing

the County Board members, rather than appointing them, was apparently to create a County Board responsive to consolidating School Districts Nos. 1 and 2. Act 547 was promptly submitted to the United States Attorney General for preclearance under section 5 of the Voting Rights Act, and received that preclearance on April 28, 1982. (J.A. 52a).

The adoption of Act 547, however, provoked substantial opposition among the white residents of District No. 1. According to the complaint, those whites circulated a petition calling for the abolition of both the County Board and the position of County Superintendent of Education, thus severing the connection between Districts One and Two. (J.A. 11a). As a result of that petition, and with the backing of the Hampton County Council, a white member of the county legislative delegation introduced legisla-

tion to overturn Act 547. This new measure was enacted on April 9, 1982 as Act 549. (App. 8a-13a). Act 549 abolished the Hampton County Board of Education and provided that its duties were to be assumed by the Trustees of School Districts 1 and 2. Beginning in November, 1982, the Trustees of those school districts were to be elected at-large at the general election. Act 549 provided that candidates for election to these newly reconstituted school boards were to file with the county Election Commission between August 16 and 31, 1982. Act 549 also abolished, as of June 30, 1985, the elected position of Superintendent of Education. Implementation of Act 549, however, required approval of a referendum of Hampton County voters to be conducted in May, 1982.

When Act 549 was adopted by the legislature there was ample time, a total

of 129 days, to obtain preclearance before the scheduled filing period was to begin on August 16. Although the Department of Justice regulations expressly authorized consideration of a preclearance request prior to the holding of any necessary referendum, 28 C.F.R. § 51.20, no effort was made to submit Act 549 during either April or May of 1982. When the county referendum approved Act 549 on May 25, 1982, there still remained sufficient time, 83 days, in which to obtain preclearance prior to the commencement of the filing period. But state and local officials delayed still further. Not until June 22, 1982, some 28 days later, was the submission received by the United States Attorney General (J.A. 58a); a total of 74 days elapsed between the enactment of Act No. 549 by the state legislature and the submission of the Act to the Attorney General. By June 28 the

time remaining until the statutory filing period was to begin was less than the 60 days normally required for preclearance under section 5.

As a result of these delays, the Attorney General had taken no action on Act 549 when the filing period for elections under that Act commenced on August 16, 1982. Despite the fact that section 5 of the Voting Rights Act forbids any implementation of a new election practice or procedure which lacks preclearance, Hampton County election officials, who were well aware of the requirements of federal law, began to accept petitions from candidates seeking election in the new districts created by Act 549. On August 23, 1982, the Attorney General objected to Act 549 insofar as it abolished the County Board. (J.A. 58a). Despite this objection, Hampton County officials continued to implement the Act

549 filing period. On September 1, 1982, after that filing period had ended, county officials submitted to the Attorney General a request for reconsideration of his objection. (J.A. 63a-65a). They also began for the first time to accept filings for election under Act 547, the only law which then had the necessary preclearance. On November 2, 1982, having received no response to their request for reconsideration, county election officials held elections for the County Board under Act 547. Of the six board members elected on that date, three were black and three were white.

On November 19, 1982, the Attorney General withdrew his objection to Act 549. (J.A. 65a). On November 29, 1982, the chairman of the Hampton County Election Commission wrote the South Carolina Attorney General and requested his opinion on three questions:

(1) Should an election be held to elect Trustees for Hampton County School Districts 1 and 2?

(2) If so, when should such an election be held?

(3) Should the filing period for the respective District Boards of Trustees be "reopened"? (J.A. 74a).

The state Attorney General responded on January 4, 1983, advising the County that it should hold new elections "[a]s soon as possible" and that it need not "reopen" the filing period. (J.A. 67a). Acting on this advice, the Hampton County Election Commission conducted elections in Districts 1 and 2 on March 15, 1983. The six individuals elected in November, 1982, to the County Board of Education were never permitted to take office.

The advice given by the state Attorney General and acted upon by the county had two distinct effects of

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importance to this litigation. First, although the express language of Act 549 authorized election of District Trustees only during a general election, the Trustees were in fact chosen at a special off-year election. Second, despite the fact that Act 549 contemplated that the filing period would begin several months after the Act went into effect, the filing period for the 1983 election in fact closed more than two months before the statute became effective. Thus the only time at which candidates for District Trustee were permitted to file for that office was when the conduct of such filings was illegal under section 5 of the Voting Rights Act.

The appellants, two civil rights organizations and several residents of Hampton County, commenced this action in the United States District Court for the District of South Carolina seeking an

injunction to forbid the proposed elections as illegal under section 5 of the Voting Rights Act,[2] and to place in office the duly elected members of the County Board of Education. Appellants alleged that the proposed elections violated section 5 because they were to occur at a time other than that provided for in Act 549, and because the elections were limited to candidates who had filed for election during the illegal August 1982

2 The complaint also alleged that the Election Commission, in violation of section 3 of Act No. 549, had failed to certify to the South Carolina Code Commissioner the results of the May 1982 referendum. (J.A. 17a-18a). Although we disagree with the district court's reasons for rejecting this claim, our review of the record indicates that that certification was in fact made. Accordingly, we do not seek review of the district court's denial of injunctive relief regarding the alleged lack of certification.

filing period.[3] Appellants also alleged that the defendants had already stripped of all authority the elected Superintendent of Education, some two years earlier than authorized by the statute approved by the Attorney General under section 5. (J.A. 18a, 70a).

Appellants unsuccessfully sought a preliminary injunction to prevent the holding of the March, 1983 special election. The single judge to whom that request was made denied it on the express premise, concurred in by counsel for appellees, that the results of the March election would be invalidated if the election were subsequently held to violate section 5:

3 The complaint also alleged that the abolition of the elected County Board of Education violated section 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments. (J.A. 22a-23a). These claims were not dismissed, and are the subject of continuing litigation in the district court.

> THE COURT: What's going to happen if a three Judge Court hears it and they say you were wrong.... They would set the election aside and go all -- have to go all over it again.
>
> [COUNSEL FOR SCHOOL BOARDS]: Exactly. I think that's exactly right.[4]

Subsequently a three judge court was convened to hear the case, as required by 42 U.S.C. § 1973c. On September 9, 1983, the district court denied appellants' request for injunctive relief and dismissed their complaint insofar as it sought to state a claim under section 5 of the Voting Rights Act. (J.S. App. 1a-11a).

SUMMARY OF ARGUMENT

I.

This case involves three changes in the South Carolina election practices with regard to the election of school officials

4 Transcript of Hearing of March 14, 1983, pp. 18-19.

in Hampton County.

First the date for the election of trustees of the local school boards was shifted from November 1982 to March 1983. This Court has previously held that a change in the date of an election is subject to section 5 of the Voting Rights Act. Berry v. Doles, 438 U. S. 190 (1978).

Second, August 16-31, 1982, was established as the period during which candidates were required to file for the March 1983 elections. Prior to the decision to set that filing period, state law did not provide for any filing period for a March election. This Court has repeatedly held that candidate filing rules are subject to section 5. Hadnott v. Amos, 394 U.S. 358 (1969); Whitley v. Williams, 393 U.S. 544, 570 (1969).

Third, the defendants allegedly abolished as a practical matter by the spring of 1983 the elected position of

County Superintendent of Education, stripping the occupant of that office of his authority. State legislation approved by the Attorney General under section 5 did not authorize the abolition of that office until 1985. A shortening of the term of office of an elected official is subject to section 5. 28 C.F.R. § 51.12 (k).

II.

The district court in holding that these changes did not require submission under Section 5 improperly established four new exceptions to the requirements of the Voting Rights Act.

(1) The district court held that any alteration of election practices was not a "change" within the scope of section 5 if that alteration occurred in connection with the implementation of another law which had itself been precleared. On this view, once a single new election law is

precleared, state authorities are free to adopt any related rules they please with regard to registration, voting, or candidates, without obtaining preclearance under the Voting Rights Act. Such a rule is clearly inconsistent with the decisions of this Court that Congress intended "to give the Act the broadest possible scope." Allen v. Board of Elections, 393 U.S. 544, 567 (1969).

(2) The district court held that when the Attorney General preclears a new state election law, he implicitly preclears in advance all subsequent changes in election practices which are made in the implementation of that law. This Court held in McCain v. Lybrand, 79 L.Ed.2d 271 (1984), that the Attorney General could not be deemed to have approved election laws of which he was actually aware unless those changes were formally submitted for preclearance. A

fortiori the Attorney General cannot be deemed to have approved unknown future changes of which he was not and could not have been aware.

(3) The district court held that if a covered jurisdiction violates section 5 by implementing a new election law which lacks preclearance, a subsequent preclearance of the law automatically renders lawful the previous violation of federal law. Perkins v. Mathews, 400 U.S. 379 (1971), however, held that whether such subsequent preclearance removes the need for further relief must be resolved based on the particular circumstances of each case.

(4) The district court held that an allegation of "either racially discriminatory purpose or effect" is "essential to a section 5 action." This Court has repeatedly held that no such claim is necessary in an action to enforce section

5. Allen v. Board of Elections, 393 U.S. 544, 558-59 (1969).

ARGUMENT

The familiar provisions of section 5 of the Voting Rights Act were first enacted in 1965 to prevent the implementation of any changes in election practices and procedures in the jurisdictions covered by section 5 until and unless there was a determination that those changes had no discriminatory purpose or effect. Section 5 requires that, prior to any such implementation, alterations in state or local election practices must be submitted for approval by either the Attorney General or the District Court for the District of Columbia.[5] Any practices constituting changes in election procedures are not "effective as laws until and

[5] Those procedures were described in detail in past decisions of this Court. McCain v. Lybrand, 79 L.Ed.2d 271, 278-80 (1984); McDaniel v. Sanchez, 452 U.S. 130, 137 and cases cited at n. 14 (1981).

unless cleared pursuant to § 5." Conner v. Waller, 421 U.S. 656, 656 (1975) (per curiam).

Congress' decision to renew the Voting Rights Act in 1970 and 1975 was based to a significant degree on its conclusion that there had been widespread violations of section 5. McCain v. Lybrand, 79 L.Ed. 2d 271, 281, 284 n. 23 (1984). That same problem lay behind the renewal of the Act in 1982.[6] The Senate report of that year noted:

> Noncompliance generally has taken two forms. First, there has been continued widespread failure to submit proposed changes in election law for Section 5 review before attempting to implement the change. Second, there continue to be instances of changes having been implemented despite a prior Department of Justice objection.[7]

6 Because the 1982 extension of the Voting Rights Act is the controlling statute in this case, the legislative history of that extension is of particular relevance. McDaniel v. Sanchez, 452 U.S. 130, 147 n. 25 (1981).

7 S. Rep. No. 97-417, p. 13 (1982); see also H.R. Rep. No. 97-227, p. 13 (1981).

The House report found that in 1980 alone the Attorney General had been forced to formally request the submission of 124 changes which never received section 5 preclearance.[8] The Senate report emphasized that this continuing pattern of illegality was particularly inexcusable years after the validity and scope of section 5 had been resolved, and noted that minority voters often found it necessary to file suit to compel compliance with section 5.[9] This is such an action.

I. THE NATURE OF THE CHANGES IN APPELLEES' ELECTION PRACTICES

This appeal involves three distinct election practices which were not in effect on November 1, 1964, the date after which all changes in election procedures

8 H.R. Rep. No. 97-227, p. 13.

9 S. Rep. No. 97-417, p. 48 (1982).

require section 5 preclearance.

The first such change in election practices was the alteration of the date for conducting the initial election of the trustees of the local school boards from November 1982 to March 1983. As of November 1, 1964, of course, no elections for those boards, and thus no election dates, were authorized. Act No. 549, which provided for such elections and ultimately received section 5 preclearance, authorized the election of district trustees only at the "general election" held in November of even-numbered years in South Carolina.

If South Carolina had enacted a statute altering the election date from the November general election to March of an off-year, such legislation would clearly have been a change in a "standard, practice or procedure with respect to voting..." 42 U.S.C. § 1973c. This Court

has repeatedly held that Congress intended section 5 "to reach any state enactment which altered the election law of a covered State in even a minor way." Allen v. State Board of Elections, 393 U.S. 544, 566 (1969). In Berry v. Doles, 438 U.S. 190 (1978), this Court held that section 5 applied to a state statute changing the time at which certain Georgia county officials were to be elected. The result is no different merely because here the change was achieved without any formal legislation. Such a change in the timing of an election has an obvious potential adverse impact on the number of minority voters participating when, as here, the election is moved from a regular general election to a special election, since voter turnout at special elections is predictably lower. In the instant case, for example, over 6000 Hampton County voters participated in the November 1982

general election,[10] while less than half that number voted in the March 1983 special election.

Second, the procedures adopted by appellees effectively constituted a change in the candidate filing rules. Act 549, as approved by the Attorney general, authorized only two filing periods, the August 16-31 period for a contemplated November, 1982, school board election, and the usual filing period for subsequent school board elections. The Act neither established any filing period for a March 1983 special election, nor sanctioned the use of the August 1982 filings for any election other than that to occur in November, 1982.

This Court has repeatedly held that candidate qualification rules are subject to section 5. City of Rome v. United States, 446 U.S. 156, 160-61 (1980)

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10 Complaint, Exhibit 15-1.

(residence requirement); Dougherty County v. White, 439 U.S. 32 (1978) (mandatory leave for candidate in government job); Hadnott v. Amos, 394 U.S. 358 (1969) (filing requirements for independent candidates); Whitley v. Williams, 393 U.S. 544, 570 (1969) (filing requirements for independent candidates). The Justice Department section 5 regulations expressly require submission of "[a]ny change affecting the eligibility of persons to become candidates." 28 C.F.R. § 51.12(g). Submission of changes in such laws is required because candidate qualification rules may "undermine the effectiveness of voters who wish to elect ... candidates" excluded by those rules. Allen v. Board of Elections, 393 U.S. at 570.

The new filing rule at issue in this case to an extraordinary degree "burdens entry into elective campaigns and, concomitantly, limits the choices

available to voters." Dougherty County v. White, 439 U.S. at 40. The standard adopted in January 1983 for the March 1983 special election required prospective candidates to have filed no later than August 31, 1982. By the time that that requirement was announced, the deadline it imposed was more than four months past. This unusual ex post facto requirement had an obvious discriminatory impact. First, the March special election was open only to candidates who had been willing to participate in the palpably illegal August 1982 filing, which had been conducted at a time when implementation of Act No. 549 violated section 5. Prospective candidates[11] could only obtain a place on the

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11 Several blacks sought unsuccessfully to file for elction to the local boards following the January, 1983 announcement that there would be an election in March. Among those prevented from seeking office was appellant Brooks, a former member of the County Board of Education. (J.A. 14a-15a).

March 1983 ballot by "obeying" in August 1982 election rules to which an objection had been interposed by the Attorney General and which under the Voting Rights Act were not and could not then have been "effective as laws." Connor v. Waller, 421 U.S. 656 (1975). Second, since only one black candidate[12] had filed for election as a trustee of District No. 1 during the illegal August 1982 filing period, the rule guaranteed white domination of that District regardless of the wishes of minority voters, and deprived those voters of any opportunity to vote for more than a single black candidate. Thus, had the decision to require an August, 1982 filing been submitted to the Attorney General, there is good reason to believe that he would have objected to it.

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12 Lenon Brooker. He was among the five candidates elected in March, 1983.

Third, the complaint alleged that in early 1983 the appellees had as a practical matter abolished the elected position of County Superintendent of Education. (J.A. 18a-19a). An affidavit of the Superintendent detailed the manner in which, as early as July 1, 1982, he had been largely stripped of his authority. (J.A. 70a-73a). On a motion to dismiss the district court was obligated to accept these allegations as true. The elected position of Superintendent of Education existed prior to 1982. The current four year term of Superintendent Dodge does not expire until June 30, 1985. Act No. 549 provides for the abolition of that position as of June 30, 1985, but does not alter the authority of the Superintendent prior to that date. If, as alleged, the appellees have effectively shortened the term of the Superintendent of Education, that is clearly a change covered by

section 5. Section 51.12(k) of the Department of Justice regulations provides that section 5 applies to "[a]ny change in the term of an elective office ... e.g. by shortening the term of an office...."[13]

II. THE CHANGES IN APPELLEES' ELECTION PRACTICES LACK THE NECESSARY PRECLEARANCE UNDER SECTION 5 OF THE VOTING RIGHTS ACT.

The district court concluded that none of the election practice changes at issue in this case required a formal preclearance under section 5 of the Voting Rights Act. The district court offered several distinct theories for reaching this conclusion, each of which, we urge, was clearly inconsistent with the decisions of this Court.

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[13] The district court's opinion contains no clear explanation of why that court rejected this claim. We assume that the lower court did so because of one of the doctrines discussed infra.

(1) The "Ministerial Act" Exception

The district court reasoned, first, that once an election law is precleared, section 5 is simply inapplicable to any alterations in election procedures which occur in the implementation of that precleared law. Thus the new procedures involved in this case, it asserted, did not

> constitute "changes" within the meaning of Section 5. Each of these acts were not alterations of South Carolina law, but rather steps in the implementation of a new statute.... [T]he preclearance requirement of Section 5 applied to the new statute, Act No. 549, while the ministerial acts necessary to accomplish the statute's purpose were not "changes" contemplated by Section 5, and thus did not require preclearance. (J.S. App. 8a-9a).

On the district court's view, once Act 549 was precleared, Hampton County election officials were free to select any date for the trustee elections and to adopt any filing requirement, regardless of whether,

as in fact occurred, the date and filing requirement were different than those in the Act submitted to and approved by the Attorney General of the United States.

Under the theory advanced by the district court, the preclearance of any single election law automatically carries with it a sort of prospective indulgence, immunizing from section 5 scrutiny any subsequent change in election law practice or procedure so long as that change is somehow related to the implementation of the approved statute. This Court has consistently refused to create an exception to section 5 for purportedly "minor" changes made by local election officials, see e.g. Perkins v. Mathews, 400 U.S. 379 (1971), and the Attorney General has properly insisted that even those technical changes in election procedures needed to implement longstanding election laws must be submitted for preclearance.

City of Rome v. United States, 446 U.S. 156, 183 (1980).

The changes at issue in this case were in fact far from minor. On the contrary, they involved a change in the date of an election, an alteration of the filing requirements for one office, and the effective abolition in mid-term of another elective office. Under the doctrine espoused by the district court, any choice made by election officials, regardless of its practical importance, is outside the scope of section 5 so long as the choice was made in connection with a new election law. Such a sweeping exemption from the coverage of section 5, carrying with it an open invitation to evasion of the requirements of the Voting Rights Act, is clearly inconsistent with the intent of Congress "to give the Act the broadest possible scope." Allen v. Board of Elections, 393 U.S. at 567.

(2) Preclearance of Unknown Future Changes

The district court suggested, in the alternative, that the new election procedures at issue in this case had somehow "been precleared along with the ... provisions of Act No. 549." (J.S. App. 9a). In particular the court asserted, apparently with regard to the illegal August 1982 filing period, that "the eventual preclearance of Act 549 ratified and validated for Section 5 purposes those acts of implementation which had already been accomplished." (App. 10a).

This Court, however, has repeatedly rejected suggestions that the Attorney General be deemed to have approved changes in election procedures where those changes were not formally submitted to him in full compliance with the applicable section 5 regulations. City of Rome v. United

States, 446 U.S. at 169 n. 6; United States v. Sheffield Board of Commissioners, 435 U.S. 110, 136 (1978); Allen v. Board of Elections, 393 U.S. at 571. Even if the Attorney General had known of the proposed changes in this case, that would not have been sufficient; the responsible authorities must "in some unambiguous and recordable manner submit any legislation or regulation in question to the Attorney General with a request for his consideration pursuant to the Act." Allen v. Board of Elections, 393 U.S. at 571. "[T]he purposes of the Act would plainly be subverted if the Attorney General could ever be deemed to have approved a voting change when the proposal was neither properly submitted nor in fact evaluated by him." United States v. Sheffield Board of Commissioners, 435 U.S. at 136.

In the instant case the Attorney General could not possibly have evaluated or intended to approve the changes at issue when he withdrew his objection to Act 549, since that objection was withdrawn in November, 1982, and the decisions at issue -- to hold a special election and to require candidates to have registered in August, 1982 -- were made in January 1983, two months after the Attorney General's action. If a decision by the Attorney General to preclear a new statute has the sweeping effect attributed to it by the district court, approving as well both premature implementing steps of which the Attorney General may be unaware, and subsequent implementation actions which he could not foresee, it would be impossible for the Attorney General to carry out his responsibilities under section 5 in an informed and conscientious manner. Under the best of circumstances

"[t]he judgment that the Attorney General must make is a difficult and complex one, and no one would argue that it should be made without adequate information." Georgia v. United States, 411 U.S. 526, 540 (1973). But if the Attorney General cannot know in advance what implementing steps he is implicitly approving, it would be manifestly impossible to make the critical judgment which Congress contemplated.

This aspect of the district court's opinion presents in a more extreme form the argument unanimously rejected by this Court last term in McCain v. Lybrand, 79 L.Ed.2d 271 (1984). In McCain the defendant officials urged that a 1966 statute had been precleared by the Attorney General, even though that statute had only been provided to the Attorney General in connection with the submission of a separate law adopted in 1971, and

despite the fact that no formal request had ever been made for approval of the earlier measure. Although the Attorney General in McCain actually knew of the existence of the 1966 statute, this Court declined to assume, as South Carolina officials there urged, that the Attorney General had tacitly given his approval to that statute, explaining that to do so "would require a wild flight of imagination." 79 L.Ed.2d at 285. The suggestions of the district court in this case, that the Attorney General somehow approved in November, 1982, of changes which were not even decided upon until 1983, and which it was thus literally impossible that the Attorney General knew about at the time, is even less plausible than the flight of imagination spurned by this Court in McCain.

(3) "Retroactive Validation"

The district court also held that the November, 1982, preclearance of Act 549 ipso facto removed all taint of illegality from the August 1982 filing period. Relying on this Court's decision in Berry v. Doles, 438 U.S. 190 (1978), the court below held that "a retroactive validation of an election law change under Section 5 could be achieved by after-the-fact federal approval." (J.S. App. 10a). The appellee Election Commission characterizes this "principle of retroactive approval"[14] as meaning that the approval of a change in election law under section 5 automatically and invariably approves nunc pro tunc all violations of the Voting Rights Act occasioned by the illegal implementation of that new state law. Because of this rule, the Commission suggests, so

14 Election Commission Motion to Affirm, p. 17.

long as Act 547 had not yet been rejected by the Attorney General under section 5, local officials would have been "derelict in their duty"[15] if they had failed to enforce that change in state election law. Even after the Attorney General disapproved Act 549, further implementation, the Commission asserts, was "necessitat[ed]" by the fact that a request for reconsideration was pending.[16] In the Commission's view the decision below not merely permits but actually requires local authorities to implement an unapproved change in election law in violation of the Voting Rights Act so long as there is any hope that that violation will later be forgiven under the "principle of retroactive approval." Because of this principle, the Commission asserts, the issuance of an injunction against the

15 Id. p. 10.
16 Id., 17 n. 2.

holding of an election which violates section 5 should be "the exceptional remedy rather than the normal one."[17]

This extreme rule of retroactive approval finds no support in the decisions of this Court. In Berry, as in Perkins v. Mathews, 400 U.S. 379 (1971), the issue before this Court was whether an election held without the necessary section 5 preclearance should be voided and conducted anew even though the changes at issue subsequently received the required preclearance. Neither case established a per se rule that such relief was never appropriate. Perkins held only that "[i]n certain circumstances" invalidation of an action taken in violation of section 5 might not be required, 400 U.S. at 396, and Berry merely found such circumstances to be present on the particular facts of that case. 438 U.S. at 192. On remand in

17 Id., 12 n. 1.

Perkins the district court in fact ordered a new election despite the fact that the new election law prematurely implemented at the previous election had subsequently been approved by the Attorney General.[18] Both Perkins and Berry recognized the desire of Congress to prevent the implementation of all election changes which had not received section 5 preclearance, not just those to which such preclearance would ultimately be denied.

Fourteen years ago, noting that the scope of section 5 raised "complex issues of first impression", this Court indicated a temporary reluctance to overturn elections conducted without preclearance. Allen v. Board of Elections, 393 U.S. at 572. In extending section 5 in 1982, however, Congress made clear its desire that the Voting Rights Act be strictly

18 Supplemental Judgment, June 19, 1972, p. 2.

complied with. Congress amended the bailout provisions of the Act to ensure that exemption from coverage by section 5 not be accorded to jurisdictions which had violated that provision. The Senate Report emphasized:

> [I]t is the Committee's intent that compliance with Section 5 means that even if an objection is ultimately withdrawn or the judgment of the District Court for the District of Columbia denying a declaratory judgment is vacated on appeal, the jurisdiction is still in violation if it had tried to implement the change while the objection or declaratory judgment denial was in effect. S.Rep. No. 97-417, p. 48.

Virtually identical language appears in the House Report. H.R. Rep. No. 97-227, p. 42. Both the House and Senate Reports include extensive references to the failure of covered jurisdictions to make the timely submissions required by section 5. (See p. 20-22, supra.)

As Justice Brennan noted in his concurring opinion in Berry, in the absence of any credible threat that actions violative of section 5 will be invalidated by the federal courts, "the political units covered by §5 may have a positive incentive flagrantly to disregard their clear obligations and not to seek preclearance of proposed voting changes." 438 U.S. at 194. That is exactly what occurred in the instant case. The defendant election officials knowingly implemented Act 549 when it lacked section 5 preclearance, in the hope that such preclearance would eventually be obtained, and in the apparent belief that subsequent preclearance would immunize from redress that violation of federal law. The district court's decision encourages precisely the sort of section 5 violation which undeniably occurred in August 1982,

and flies in the face of the clear intent of Congress.

(4) The Requirement of a Claim of Discrimination

Finally, the district court held that an allegation of "either racially discriminatory purpose or effect" was "essential to a Section 5 action." (J.S. App. 8a). This is a thinly disguised version of a construction of section 5 that has been repeatedly and unanimously rejected by this Court. In Allen v. Board of Elections this Court held:

> A declaratory judgment brought by the State pursuant to §5 requires an adjudication that a new enactment does not have the purpose or effect of racial discrimination. However, a declaratory judgment action brought by a private litigant does not require the Court to reach this difficult substantive issue. The only issue is whether a particular state enactment is subject to the provisions of the Voting Rights Act, and therefore must be submitted for approval before enforcement. 393 U.S. at 558-59. (Emphasis in original).

In Perkins v. Matthews, 400 U.S. 410 (1971), the district court dismissed a section 5 action because it believed that the election law changes at issue lacked any discriminatory purpose or effect. This Court reversed:

> The three-judge court misconceived the permissible scope of its inquiry into [plaintiff's] allegations.... What is foreclosed to such district court is what Congress expressly reserved for consideration by the District Court for the District of Columbia or the Attorney General -- the determination whether a covered change does or does not have the purpose or effect "of denying or abridging the right to vote on account of race or color." 400 U.S. at 383-85.

That rule has since been reaffirmed in Dougherty County v. White, 439 U.S. 32, 42 (1978), United States v. Board of Supervisors, 429 U.S. 642, 645-46 (1977), and McCain v. Lybrand, 79 L.Ed.2d 271, 282 n. 17 (1984). Neither the evidence adduced

in a private action to enforce section 5, nor the allegations of the complaint in such an action, are to be tested by standards which Congress has expressly reserved to a preclearance proceeding in the District Court for the District of Columbia or before the Attorney General.

CONCLUSION

For the above reasons, the decision of the district court should be reversed.

Respectfully submitted,

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VOTING RIGHTS ACT OF 1965, SECTION 5

Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. §1973c, provides:

> §1973c. Alteration of voting qualifications and procedures; action by State or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court; appeal to Supreme Court
>
> Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in

force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the

United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequiste, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973(b)(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted

by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objections will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney

General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

ACT NO. 547, SOUTH CAROLINA LAWS (1982)

Act No. 547, South Carolina Laws 1982, provides:

Composition of Hampton County Board of Education SECTION 1. Notwithstanding any other provision of law, beginning January 1, 1983, the Hampton County Board of Education shall be constituted and elected as follows:

A. (1) Six members shall be elected at large from the county in an election conducted by the county election commission at the time general elections are held beginning with the general election of 1982.

(2) To have his name placed on the ballot a person must file with the election commission, not less than forty-five days before the election, a petition signed by not less than fifty qualified electors of the county. Each signature shall be followed by the voter registration number of the petitioner. Petitions must be approved by the county board of voter registration.

(3) No political party designation shall appear on the ballot in connection with the names of candidates.

(4) The six candidates receiving the highest vote in the election shall be declared elected. In the event of a tie vote, procedures provided in the state election laws shall apply.

B. Terms of members shall be for four years and until their successors are elected and qualify except that in the initial election of 1982 the three members elected who receive the smallest vote shall serve initial terms of two years only.

C. Vacancies shall be filled in the next general election for a full term or unexpired term as the case may be except that if a vacancy occurs more than one year prior to a general election it shall be filled by appointment by the Governor upon recommendation of a majority of the county legislative delegation for a period until the vacancy can be filled by election.

D. In addition to the elected members, the county superintendent of education shall serve ex officio as a member of the board and in such capacity shall have all rights and privileges of other board members, including the right to vote.

E. As of December 31, 1982, the terms of all board members then serving shall expire.

F. Except as provided in this act the powers, duties and procedures of the board as prescribed by law shall continue in full force and effect.

Time effective

SECTION 2. This act shall take effect upon approval by the Governor.

ACT NO. 549, SOUTH CAROLINA LAWS (1982)

Act No. 549, South Carolina Laws, provides:

Board of education abolished, trustees elected

SECTION 1. Contingent upon approval of the total proposal by a majority of the qualified electors voting in a referendum to be held in May, 1982, as hereafter provided for, the following shall occur:

(a) The Hampton County Board of Education shall be abolished at midnight on June 30, 1982; the office of the Hampton County Superintendent of Education shall be abolished at midnight on June 30, 1985; upon abolition their respective duties shall devolve upon the trustees for Hampton County School Districts Nos. 1 and 2; and after June 30, 1982, the Hampton County Treasurer shall pay any proper claim approved by a majority of the trustees of either School District No. 1 or School District No. 2, on behalf of

their respective district, provided sufficient funds are on deposit in the proper district account.

(b) Beginning with the general election in November, 1982, trustees for Hampton County School Districts Nos. 1 and 2 shall be elected by a plurality vote of the electors within their respective district qualified and voting at the general election for representatives. The number of trustees shall be five for each school district and their terms of office shall begin January 1, 1983. The three candidates in each district receiving the highest number of votes shall serve for terms of four years and the remaining two trustees shall have initial terms of two years, after which all terms shall be for four years. In each case trustees shall serve until their successors are elected and qualify and each school board shall elect its chairman annually. Trustees

shall receive no salary but shall be reimbursed for actual expenses incurred. A candidate for membership on a school board must reside in the school district he seeks to represent and all candidates offering for election in November, 1982, must file during the period August 16-31, 1982.

Referendum conducted

SECTION 2. The Hampton County Commissioners of Election shall conduct a referendum within the respective county school districts during May, 1982, to determine whether the provisions of Section 1 of this act shall be implemented. The specific date for the referendum shall be determined by the county election commission. The county election commission shall thrice publish notice of the referendum in a newspaper of

a countywide circulation, the last publication to be not less than one nor more than two weeks before the referendum. All election laws contained in Title 7 of the 1976 Code applicable to county referendums shall apply. Ballots shall be prepared and distributed to the various voting precincts of the county with the following printed thereon:

"Shall the Hampton County Board of Education be abolished on June 30, 19872, and its duties placed upon the trustees for Hampton County School Districts Nos. 1 and 2; shall the office of the Hampton County Superintendent of Education be abolished on June 30, 1985, and its duties placed upon the trustees for Hampton County School Districts Nos. 1 and 2; and shall the trustees for Hampton County School Districts Nos. 1 and 2 (five trustees per district), rather than being appointed, byu elected by plurality vote

during general elections for representative beginning with the election in November, 1982, with their terms to begin January 1, 1983, and with terms of office to be four years, except that of those initially elected two from each district shall have initial terms of two years?

I agree to the above proposals ____

Yes ____ No

Place a check or cross mark in the block which expresses your answer."

SECTION 3. The Hampton County Commissioners of Election shall certify the results of the referendum directed in Section 2 of this act to the Hampton County Legislative Delegation and to the South Carolina Code Commissioner.